No. 10351.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NAT ROGAN, Collector of Internal Revenue for the Sixth District of California,

Appellant,

vs.

JAMES A. KAMMERDINER, individually and as Surviving Joint Tenant of Myrtle B. Kammerdiner, deceased,

Appellee.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

BRIEF FOR THE APPELLANT.

SAMUEL O. CLARK, JR.,
Assistant Attorney General.

SEWALL KEY,
HELEN R. CARLOSS,
HELEN GOODNER,
Special Assistants to the Attorney General.

LEO V. SILVERSTEIN,
United States Attorney.

E. H. MITCHELL,
Assistant United States Attorney.

U. S. Postoffice and Courthouse
Building, Los Angeles.

Parker & Baird Company, Law Printers, Los Angeles

TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

CASES. PAGE

PAGE

STATUTES.

MISCELLANEOUS.

INDEX TO APPENDIX.

No. 10351.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NAT ROGAN, Collector of Internal Revenue for the Sixth District of California,

Appellant,

vs.

JAMES A. KAMMERDINER, individually and as Surviving Joint Tenant of Myrtle B. Kammerdiner, deceased,

Appellee.

BRIEF FOR THE APPELLANT.

Opinion Below.

The findings of fact and conclusions of law of the District Court [R. 55-66] are unreported.

Jurisdiction.

This appeal involves federal estate tax and interest in a total amount of $22,090.65. The tax and interest were paid by the taxpayer on May 10, 1938. [R. 57.] A claim for refund was filed on July 7, 1939 [R. 57], and an amended claim for refund was filed on October 7, 1939. [R. 27-45, 57.] The original and amended claims were rejected by the Commissioner on February 2, 1940. [R. 45-46, 58.] On June 12, 1940, the taxpayer instituted

an action in the District Court for recovery of the taxes and interest paid. [R. 2-46.] The judgment of the Court, allowing the claim in full, was entered on July 15, 1942. [R. 67-68.] On July 22, 1942, the Collector filed a motion for a new trial and to amend and add findings and conclusions. [R. 69-82.] The motion was denied by the District Court on August 5, 1942. [R. 84.] Within three months and on October 20, 1942, the Collector filed a notice of appeal [R. 84-85], pursuant to the provisions of Section 128(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

1. Whether one-half of the Kammerdiner rotary jar business and its assets, owned in joint tenancy by taxpayer and his wife in 1935, "originally belonged" to the deceased wife, so that the value thereof is includible in her gross estate, within the meaning of Section 302(e) of the Revenue Act of 1926, as amended.

2. If one-half of the rotary jar business and its assets did not originally belong to the deceased wife, whether she acquired her one-half interest therein for an adequate or full consideration in money or money's worth, so that the value of her interest is includible in her gross estate, within the meaning of Section 302(e) of the Revenue Act of 1926, as amended.

Statutes and Regulations Involved.

The applicable statutes and regulations are printed in the Appendix, *infra*.

Statement.

The facts as here stated are summarized from the evidence adduced by both parties [R. 91-477], and from the findings of the District Court[1] [R. 56-65]:

James A. Kammerdiner (hereinafter referred to as "taxpayer") is the surviving husband of Myrtle B. Kammerdiner (hereinafter referred to as "wife") who died on April 4, 1935, at Los Angeles, California. [R. 56.]

Appellant is the duly appointed, qualified, and acting Collector of Internal Revenue for the Sixth District of California. [R. 3, 56.]

In 1908 taxpayer and his wife were married in Orange County, California, and from that time until the wife's death they resided in the State of California. [R. 96.] At the time of marriage neither the taxpayer nor his wife owned any assets or property, except that taxpayer had about $200 in cash. [R. 97, 98.] At this time they agreed orally that all of the earnings and property which they might acquire would be owned equally and that the wife would have a vested one-half interest therein. [R. 199-200, 201-202, 216, 253-254, 255-256.] Neither taxpayer nor his wife has ever acquired any property by gift or inheritance. [R. 109.]

---

[1]The District Court's findings regarding the deceased wife's interest in the rotary jar business consist only of ultimate findings. Since the extent of the wife's interest in that business for purposes of the federal estate tax is the issue involved, we have set out the evidentiary facts disclosed by the record in detail. We contend that the District Court's ultimate findings crumble when the evidentiary facts are considered. See argument, *infra*.

At the time of the marriage, taxpayer was employed as an oil well driller on a salary basis and he continued to engage in that work until the year 1923. [R. 98.] His only source of income prior to 1923 was his salary for personal services. [R. 108-109, 111.]

Commencing in 1909, taxpayer's wife operated and managed a large boarding house situated on the oil lease on which taxpayer was employed. [R. 98, 110, 112, 443.] Her profits saved from this venture in six years of operation amounted to more than $3,000. [R. 98, 201, 443.]

In 1909, about the time that she started the boarding house venture, taxpayer and his wife made an oral agreement, similar to the agreement at the time of marriage, that all of her profits from the boarding house and all of his earnings in the oil fields would be deposited in a joint account in both their names and that all their earnings and property would be owned and divided equally between them. [R. 99, 112, 114.] This agreement was identical with the agreement made in 1923 in connection with the rotary jar business, hereinafter referred to. [R. 99, 111-112.]

Thereafter all of taxpayer's salary and all of the wife's profits from the boarding house were deposited in a joint banking account standing in both names, against which either party had an unrestricted right to draw. [R. 99, 112-113, 114, 189, 201, 213.] In addition to the joint account, taxpayer kept a small emergency account in his name in a town near the oil lease on which he was employed. [R. 113.] From 1909 until the wife's death in 1935, taxpayer and his wife continued to maintain joint bank accounts, in which they deposited all of their receipts, except for the emergency fund, from whatever source derived. Some of the joint accounts were in the

names of taxpayer or his wife, or the survivor. [R. 113-114, 117-144, 145-147.]

Between 1909 and 1923, taxpayer and his wife purchased several pieces of real estate, paying the purchase price from their joint bank account. The title to these properties was originally taken in the name of taxpayer but was subsequently changed to both their names. [R. 190-192, 193-194, 195-196.] The first piece of property was purchased shortly after their marriage and before the joint bank account had been started. The first installments of the purchase price of that property were paid from taxpayer's salary. [R. 186-187, 188, 189.] Taxpayer always consulted with his wife before any property was purchased. [R. 191.]

In 1922 the taxpayer invented the "Kammerdiner rotary jar," which was a device for recovering lost tools and parts from oil wells. [R. 101-102, 148, 443.] Taxpayer's wife urged him to procure a patent thereon and she hired a patent attorney, who filed an application for a patent in October, 1922. A patent issued in the name of taxpayer was obtained for the device a year later. [R. 102, 106, 148, 207-208, 262, 433, 444, 445-446, 467.] The costs of obtaining the patent and the patent attorney's fees were paid from the joint bank account of taxpayer and his wife. [R. 433.] The first set of jars was manufactured in April, 1923, and the cost thereof was also paid with funds from the joint account. [R. 445, 461.]

In April, 1923, after the rotary jar had first been tested, taxpayer and his wife entered into an oral agreement providing that they would engage together in the business of manufacturing, renting and selling rotary jars as partners or as joint tenants with right of survivor-

ship; that all their property would be available for use in the business; that all profits or losses from the business would be divided equally; that the wife had a vested one-half interest in all the patents, property, and profits of the business as her separate property; that taxpayer would take care of the field work in connection with the business and that the wife would tend to all the office work; and that the joint bank accounts would be continued as in the past. [R. 100, 199, 200, 201, 206, 207, 252, 253, 255, 256, 295-298, 301, 302-305, 445-446, 465, 468-469.] The agreement included not only the rotary jar business and the patents but all other property, whether it stood in the name of taxpayer or his wife, and property which they might acquire. [R. 202, 203, 464-465.]

The same agreement had existed since marriage with respect to all their property and income, and there was no difference between the 1923 agreement and the one made at the time of marriage. [R. 199-200, 201, 202, 216, 253, 254, 256.]

Thereafter taxpayer and his wife engaged as partners or joint tenants in the business of manufacturing and renting or licensing rotary jars in the United States. In foreign countries the jars were sold outright. The capital required to start the business was obtained from the joint bank accounts of taxpayer and his wife. [R. 107, 206, 253, 264, 460-461, 462.]

The business was conducted under the name of James Kammerdiner because he was well-known in the oil business and taxpayer and his wife thought that his name would be more advantageous from a business standpoint. [R. 108, 463-464, 471.]

The taxpayer supervised the manufacture of rotary jars and performed the field work in connection with their

leasing and operation. [R. 253-254, 448.] His wife managed the office and performed all duties in connection therewith, devoting her full time thereto. She did the banking, handled the finances and correspondence, kept the books, made agreements and gave orders for the manufacture of rotary jars; received orders from and investigated the credit of customers; entered into rental contracts with customers, billed and collected the rentals due, paid bills, and attended to advertising. [R. 144-145, 216, 252, 253-254, 447, 448-449, 451-452, 464, 469, 471, 473.] She received no salary for her services at any time. [R. 252, 255, 464, 473.]

Taxpayer and his wife discussed together everything of importance in connection with the business and their investments, and each had an equal voice therein. [R. 202-203, 254, 451-452, 470.]

The business was successful and large profits were derived. All receipts from the rotary jar business were deposited in the joint accounts and all expenses in connection therewith were paid from the joint accounts. [R. 145-147, 206, 264, 434, 450, 459, 467, 470, 472-473.]

Prior to the wife's death in 1935 some 18 or 20 additional patents were acquired in taxpayer's name. They were purchased to protect the original patent and to prevent infringements and lawsuits. The prices paid for the patents ranged from $1,000 to $34,000, in one instance, and the purchase price for the patents was paid from the profits from the business deposited in the joint accounts. At the time of the wife's death, the basic patent was the most valuable. [R. 102-103, 107, 208, 210, 211, 212-213, 434-435.]

The profits from the rotary jar business were reinvested by taxpayer and his wife in real estate, stocks and bonds,

orange groves, and other properties. All of the property so acquired was owned in joint tenancy. [R. 148, 184, 186, 196, 197.] Whatever they acquired at any time was paid for with money which they both owned. [R. 207.]

On January 3, 1928, the taxpayer and his wife executed a written agreement which remained in effect until the wife's death. [R. 103-105.] The agreement stated, declared, and agreed [R. 105]—

> that the business of manufacturing, renting and selling Rotary Jars, heretofore conducted by them under the name of James A. Kammerdiner, at 237 South Highland Avenue, Los Angeles, California, all the assets of which business is their community property, is now and all increase or change thereof shall be, their joint property with right of survivorship.

This agreement merely reduced to writing the agreement which had been in existence between them from the date of their marriage and which was reiterated in connection with the boarding house venture and again when the jar business was commenced. It did not change the manner in which the business was conducted. [R. 104, 190, 453-454, 456, 476.] When the agreement was made, any property then standing in the name of either party individually was transferred to the names of both parties as joint tenants. [R. 187, 190, 194.]

In 1931 taxpayer and his wife filed a certificate as required by Section 2466 of the Civil Code of California, in which they gave notice that they "have formed a partnership and are transacting business as copartners in the City of Los Angeles, County of Los Angeles, State of California, under the name of 'Kammerdiner Rotary Jar Company.'" [R. 214, 215.] The certificate was filed

at the instance of the wife, in order to protect them in the event of suit against them or if it became necessary to sue for infringement of any patents. [R. 215, 265.] The agreement already existing between taxpayer and his wife was not changed at the time of filing the certificate. [R. 266.]

Partnership income tax returns for the business were filed for the years 1925, 1926, and 1928 in the name of "Mr. and Mrs. J. Kammerdiner dba J. Kammerdiner." The returns stated January 1, 1925, as the date of organization of the partnership. [R. 308-312, 313-316, 317-321.] The partnership return for the year 1925 contained the following statement [R. 312]:

> Both Mrs. and Mr. Kammerdiner work in the business and agreement has been made that Mrs. Kammerdiner receives vested interest in one half of property and income, making hers separate property.

Similar statements appear on the returns for 1926 and 1928. [R. 316, 319.] Taxpayer and his wife filed individual income tax returns for the years 1925, 1926, and 1928, and each reported one-half of the income from the partnership as his or her income. On each of the returns the business of taxpayer and of his wife was stated to be "Partner in Rotary Jar Business." [R. 325-326, 328-331, 332-333, 336-339, 340-340A, 342.] In their individual income tax returns filed for the year 1929, taxpayer and his wife each stated that his occupation was "Partner or Joint Owner in Rotary Jar Business." [R. 344, 346.] For the years 1925 to 1935, inclusive, taxpayer and his wife each reported one-half of the income received from the Kammerdiner rotary jar business. [R. 63.]

For the years 1925, 1926, and 1927 the Commissioner determined deficiencies in income tax against the taxpayer on the ground that the rotary jar business and the income therefrom were community property of the type acquired by California spouses prior to July 29, 1927 and therefore belong solely to the taxpayer. [R. 61-62.] The taxpayer petitioned the Board of Tax Appeals for a redetermination of the proposed deficiencies for the years 1925, 1926, and 1927. [R. 63, 219-234, 236-250.] The petitions filed with the Board, sworn to by taxpayer, contained the following allegations [R. 220-221, 237-239]:

> Ever since he started to work on his patent rotary jar, from which patent his big increase in income has been derived, his wife has acted as his partner, in his business as well as in his home, assisted him in his work, kept the books and accounts of the business, taken care of all the correspondence and collection of accounts, and states further that his wife has been consulted and conferred with by petitioner in practically every detail of the business. It was understood then, as it had been understood for years prior to that time that petitioner and his wife were in partnership, and on the Income Tax Return for 1925 there appeared this notation, which was sworn to by Petitioner "Both Mr. and Mrs. Kammerdiner work in the business and agreement has been made that Mrs. Kammerdiner receives vested interest in one half of the property and income making hers separate property."
>
> * * * * * * * *
>
> Mrs. Kammerdiner did not receive a salary of any definite amount for work done by her in the business,

neither did petitioner as both drew out of the business whatever they required and it was agreed between petitioner and his wife that the joint account which they had always carried in bank would be continued and that Mrs. Kammerdiner would be entitled to half of the profits of the business in return for the work she performed as office manager.

Attached to the petitions were affidavits of Mrs. James Kammerdiner. [R. 232-233, 247-248.] They were substantially the same and one of them reads in part as follows [R. 247-248]:

She further states, upon oath, that when petitioner, Mr. James Kammerdiner, started to work on his patent rotary jar, as far back as the year 192...., she assisted him in every way possible, by counsel, by clerical work and by co-operation; she further states, upon oath, that while petitioner was employed out in the oilfields and other places selling his patent rotary jar, she was employed in the office and took care of all office details, keeping the books, attending to correspondence and phone calls, attending to sending out statements and collecting accounts, and generally acting as inside manager of the business. She further states upon oath, that she received no fixed salary for this work as it was understood and verbally agreed upon between her and petitioner that she had and was entitled to one half interest in the business and one half of the profits of the business, and that as there never had been any signed agreement between her and petitioner, her husband, it being always understood that they were partners in every sense of the word, it was verbally agreed

to continue everything in joint names and account in banks in joint names, as has always been done in the past.

She further states, upon oath, that it has always been her understanding that petitioner and herself were in partnership in the patent rotary jar business as in everything else since marriage.

After hearing, the Board of Tax Appeals rendered an opinion in which it stated that the only issue was whether taxpayer and his wife were equal partners in a certain business in the taxable years. It held that taxpayer and his wife joined together in April of 1923 to carry on a business enterprise for their mutual benefit, and that a partnership existed. See *Kammerdiner v. Commissioner*, 25 B. T. A. 495, 497. [*Cf.* R. 64.] The Commissioner did not appeal from the Board's decision and it became final as provided by law. [R. 64.]

The fair market value of a one-half interest in the rotary jar business and its assets at the date of the wife's death was $160,000. [R. 65, 95.]

On March 16, 1936, the taxpayer, as surviving joint tenant of Myrtle B. Kammerdiner, filed with the Collector of Internal Revenue for the Sixth District of California (appellant herein) a federal estate tax return on Form 706 showing a total net federal estate tax due of $4,332.27, which the taxpayer paid. [R. 3-4, 56.]

The return listed as jointly owned property 22 parcels of real estate, shares of stock, United States and other bonds, promissory and trust deed notes, cash in seven bank accounts, American Express travelers checks, postal savings certificates, and jewelry, of a total value of $285,-

809.23. One-half of the value of these properties was included in the wife's gross estate subject to estate tax. [R. 149-183.] The return did not include any amount for the rotary jar business but contained the following statement with respect thereto [R. 177]:

> Decedent and her surviving husband were in the business of leasing rotary jars for oil wells, which business had no tangible assets save a few old jars of little or no value.

In answer to the question on the return "Did the decedent, at the time of his death, own any interest in a copartnership or unincorporated business?" the taxpayer answered "Yes." [R. 177.]

On March 18, 1938, the Commissioner of Internal Revenue made a final determination of a deficiency in federal estate tax in the amount of $23,816.11, based on the inclusion in the gross estate of a one-half interest in the Kammerdiner rotary jar business which he valued at the date of death as $175,000. [R. 5, 21-22, 23-24, 56.]

On May 10, 1938, the taxpayer paid the Collector $19,706.44, the total amount of the deficiency less proper credit for California inheritance tax of $4,109.67, together with interest thereon from April 4, 1936, to the date of payment in the amount of $2,384.21, or a total payment of deficiency and interest of $22,090.65. [R. 6, 56.]

On July 7, 1939, the taxpayer filed with the Collector a claim for refund of federal estate tax and interest claimed to have been erroneously and illegally collected in the amount of $22,090.65. [R. 7, 56.] On October 17, 1936, the taxpayer filed an amended claim for refund in the same amount in substitution of the former claim.

[R. 27-45, 57.] On February 2, 1940, the Commissioner rejected the claims for refund in their entirety. [R. 45-46, 58.] Suit was instituted in the District Court on June 12, 1940. [R. 2-46.]

The District Court made the following findings, which appellant contends are erroneous findings as a matter of law:[2]

By the terms of the agreement of January 3, 1928, the rotary jar business and property were joint tenancy property, and no part of it is a proper part of the wife's gross estate for estate tax purposes, for the reason that the wife was not the original owner of any part thereof and any interest of the wife therein was not received for a valuable or adequate consideration. [R. 59, 61.] The whole of the wife's interest in the business was received by her from taxpayer as a gift, without any consideration, valuable, adequate, or otherwise. [R. 61.]

The District Court concluded as a matter of law (1) that Myrtle B. Kammerdiner and James A. Kammerdiner owned the rotary jar business and the assets thereof as joint tenants with the right of survivorship; (2) that the property which was invested in or entered into the creation of the joint tenancy property was all contributed by James A. Kammerdiner; and (3) that the taxpayer is entitled to recover from the appellant the amount of $22,090.65 with interest thereon at the rate of 6% from May 10, 1938. [R. 65-66.]

---

[2]Although the District Court included these as findings of fact, they are in reality conclusions of law, or mixed questions of law and fact, depending on the legal effect of the oral agreements and acts of taxpayer and his wife. As such, they are reviewable as to their correctness.

Statement of Points to be Urged.

The appellant's statement of points, all of which are relied on herein, is set out in full in the record at pages 478-484 in the form of assignments of errors. They may be grouped into two principal points, which will form the basis for the argument.

1. One-half of the rotary jar business and its assets originally belonged to the deceased wife and is includible in her gross estate.

2. The wife acquired her one-half interest in the rotary jar business and its assets for an adequate and full consideration in money or money's worth.

Summary of Argument.

I.

Section 302(e) of the Revenue Act of 1926 *prima facie* requires the inclusion in the wife's gross estate of at least one-half of the value of the rotary jar business owned in joint tenancy at the time of her death. Exclusion of the amount from the gross estate can be secured only by a clear showing that no part of the business originally belonged to the wife.

The taxpayer and his wife at the time of marriage made an oral agreement, which is effective and enforceable under California law, that all of the property which they might acquire would be owned equally by them, with right of survivorship. The oral agreement was renewed in 1909, at which time a joint bank account was established for the deposit of all their income. In 1923 the oral agreement was confirmed prior to their engaging in the rotary jar business. The understanding at that time provided in part that the business would be carried on by

both husband and wife jointly, with right of survivorship, and that the wife had a vested one-half interest in the assets and profits of the business. Her interest came into being with the inception of the business and consequently originally belonged to her within the meaning of Section 302(e). The District Court disregarded the oral agreement between taxpayer and his wife, and its judgment must therefore be reversed.

The ownership of the rotary jar business by the spouses was manifestly of the same type as that of all other property acquired by them prior to 1927. Yet the other property admittedly is includible in the gross estate; no reason was pointed out by the District Court, nor is any reason perceivable, for treating the rotary jar business any differently with respect to inclusion in the wife's gross estate.

But in any event the funds deposited in the joint bank accounts payable to taxpayer or his wife or survivor were owned in joint tenancy and any property purchased with such funds retained its character of joint tenancy property under California law. The evidence shows that the cost of the original patent and the initial capital of the business were all paid from the joint accounts and that all subsequent receipts and disbursements in connection with the business were put through the joint accounts. The wife's share of the profits subsequent to 1923 constituted her separate property, and upon reinvestment of her profits she became the original owner of the business and its assets to that extent at least. Taxpayer failed to adduce any proof by which it can be determined what portion of the value in 1935 is derived from the investment of her separate funds. In the absence of such proof, the Commissioner's determination must be approved.

Lastly, taxpayer may not in this case, in order to escape tax, abandon the position which he took from 1925-1935 in his income tax returns. That position was that his wife's interest in the rotary jar business was her separate property, and it may not be changed here.

The conclusion of the District Court that the rotary jar business was old-type community property prior to January 3, 1928, can not stand, because the Board of Tax Appeals in a prior decision which was *res judicata* had decided that the business was not community property during 1925, 1926, and 1927, by virtue of an oral agreement in 1923 creating a partnership.

II.

If the wife paid an adequate and full consideration in money or money's worth for her interest as a joint tenant in the rotary jar business, the value of that interest must be included in the gross estate under Section 302(e).

The wife furnished one-half of the initial capital of the business. This clearly is a monetary consideration for the acquisition of her interest. Moreover, she performed all of the office work in connection with the business from 1923 until her death, pursuant to her oral agreement with the taxpayer that they would carry on the business together, sharing profits and losses; that she would have a half interest in the business; and that she would handle all the office work. Under the decisions the contribution of capital and performance of services pursuant to contract constitute full consideration in money's worth for the acquisition of a joint tenant's interest in a business. Accordingly, the statute requires that the wife's gross estate include the value of her interest in the business.

ARGUMENT.

I.

One-half of the Kammerdiner Rotary Jar Business and Its Assets Originally Belonged to the Deceased Wife and Is Includible in Her Gross Estate.

The District Court found [R. 60] that at the date of the wife's death the business and assets of the Kammerdiner Rotary Jar Company were owned by taxpayer and his wife in joint tenancy, by virtue of the agreement of January 3, 1928. Section 302(e) of the Revenue Act of 1926, as amended (Appendix, *infra*), requires the inclusion in the gross estate of the decedent's interest in property owned in joint tenancy with another person, except such part as may be shown to have originally belonged to the other person, and not to have been acquired for an adequate and full consideration in money or money's worth. Under this section one-half of the value of the rotary jar business was *prima facie* includible in the wife's gross estate, because it was owned in joint tenancy. Treasury Regulations 80, Article 23 (Appendix, *infra*). To secure its exclusion from the wife's estate the taxpayer had the burden of proving that he originally owned the entire business and that his wife acquired her interest without paying full consideration. *Foster v. Commissioner,* 90 F. (2d) 486 (C. C. A. 9th), affirmed *per curiam,* 303 U. S. 618, rehearing denied, 303 U. S. 667.

The District Court held [R. 60-61] that the rotary jar business was old-type community property and originally belonged to the taxpayer in its entirety. The Government contends that this holding is erroneous and that the wife owned originally one-half interest in the business and its assets, by reason of an oral agreement between husband

and wife, dating from the time of marriage, giving her a separate interest in all property acquired by them.

In the absence of some other agreement, all property acquired by either husband or wife after marriage, except that acquired by gift or inheritance, becomes community property in California. Prior to the enactment of Section 161a of the Civil Code of California (Appendix, *infra*) in 1927, a wife had only an expectancy, but that section gave her a present and vested interest in all community property acquired after July 29, 1927. *Gillis v. Welch,* 80 F. (2d) 165 (C. C. A. 9th).

But a husband and wife may agree to hold their property in some way other than as community property. Under Section 158 of the Civil Code (Appendix, *infra*) a husband and wife may make any agreement respecting property, which either might make if unmarried. They may agree to hold property as joint tenants, tenants in common, or as community property. Section 161 Civil Code of California (Appendix, *infra*). Agreements so made by husband and wife have been recognized and given effect for tax purposes.

Where the parties agreed that the wife should have a vested half interest in community property acquired before July 29, 1927, such as she would have had in the property under California law if acquired after that date, only one-half of the property acquired before that date may be included in the husband's estate for estate tax purposes, the wife's interest having vested upon the execution of the agreement. *United States v. Goodyear,* 99 F. (2d) 523 (C. C. A. 9th).

An agreement made at the time of marriage by a husband and wife that the earnings of each were to remain

his or her separate property, free of any community interest, has also been recognized as valid and has precluded taxation of the wife's earnings as the husband's income. *Helvering v. Hickman,* 70 F. (2d) 985 (C. C. A. 9th); *Marshall v. United States,* 26 F. Supp. 474 (C. Cls.), certiorari denied, 308 U. S. 597.

In *Anderson v. Commissioner,* 78 F. (2d) 636 (C. C. A. 9th), this Court held that an oral agreement between husband and wife that each should own a separate one-half interest in all of their income and property is binding and enforceable; and that each spouse is taxable on one-half of the income received from every source. See also *Dollar v. Commissioner,* 41 B. T. A. 869; *Fletcher v. Commissioner,* 44 B. T. A. 429; *Young v. Young,* 126 Cal. App. 306, 14 P. (2d) 580; *Lagar v. Erickson,* 13 Cal. App. (2d) 365, 56 P. (2d) 1287; holding that oral agreements are effective in California to transmute community property to separate property.

It is therefore clear that the oral agreement made by taxpayer and his wife at the time of marriage, and reiterated in 1909 and again in 1923, must be given effect. As testified to by the taxpayer, the oral agreement with his wife at the time of marriage was that all earnings and property which they might acquire would be owned equally, with right of survivorship, and the wife would have a vested one-half interest therein. [R. 199-200, 201-202, 216, 253-256.] In 1909, when the wife went into business on her own, it was again agreed that all their property would be owned and divided equally and that all earnings and profits would be deposited in joint bank accounts in both their names. [R. 99, 111-112, 114.] Again in April, 1923, after the first rotary jar had been successfully tested, taxpayer and his wife specifically agreed that they would

engage together in the business of manufacturing, leasing, and selling rotary jars as joint tenants with right of survivorship and as partners; that the wife had a vested one-half interest as separate property in the patent rights, property and profits of the business; that all the property they then owned would be available for use in the business and that the joint bank accounts would be continued in connection with the business; that the taxpayer would take care of the field work and that the wife would handle all the office work; and that profits and losses would be shared equally. [R. 100, 199-201, 206-207, 252-253, 255-256, 295-298, 301-305, 445-446, 465, 468-469.][3] In his testimony taxpayer referred to the arrangement between them as a joint tenancy with right of survivorship [R. 104, 199-200, 255-256]; as an agreement "to divide 50-50, win or lose" [R. 100, 112, 206]; as giving the wife a vested interest in one-half of the property and income [R. 199, 201-202, 312]; and as creating a partnership [R. 216, 253-254, 255, 256; and see record before Board of Tax Appeals, R. 439-476].[4]

The existence of a joint tenancy in all their property is substantiated by the fact that from the beginning joint bank accounts in the names of husband and wife, payable to the survivor, were maintained, in which were deposited all earnings, profits, and income from whatever source and

---

[3]At one point in the record [R. 109-110] the taxpayer testified that he never had an agreement with his wife that her wages or earnings should be her separate property or belong separately to her. While this might be regarded as somewhat inconsistent with the other testimony, it is clear that the taxpayer meant that they did not intend her earnings to be segregated from the joint funds and be handled separately. Given this construction, the testimony is consistent with all the other evidence on the point.

[4]The effect of the Board's holding that a partnership was created in 1923 is discussed *infra*. For purposes of the present point we discuss only the effect of a joint tenancy between taxpayer and his wife, created by the oral agreements. Either theory supports the conclusion that one-half of the rotary jar business originally belonged to the wife.

against which either party had an unrestricted right to draw [R. 99, 111-112, 113-114, 117-144, 201, 213];[5] and by the further fact that the written agreement in 1928 [R. 105], which merely reduced to writing the oral agreement which had always existed between taxpayer and his wife [R. 104, 190, 453-454, 456, 476], recited that all property was held in joint tenancy with right of survivorship. It is evident then that the oral agreement at the time of marriage established a joint tenancy in all property acquired by either spouse, and the wife's interest therein constituted her separate property. *Siberell v. Siberell,* 214 Cal. 767, 7 P. (2d) 1003; *Young v. Young, supra; Meyer v. Thomas,* 37 Cal. App. (2d) 720, 100 P. (2d) 360.

Thus at the inception of the rotary jar business the wife owned a one-half separate interest in the business and its assets by virtue of the existing oral agreement which was reaffirmed at that time. The business never became community property, but came into being as separate property. *Helvering v. Hickman, supra; Anderson v. Commissioner, supra.* It should be noted that the 1923 agreement specifically provided that the wife's one-half interest embraces the rights under the patent,[6] all property and profits of the rotary jar business. [R. 199, 203, 206, 255, 312, 445, 464-465.] It follows that one-half of the business and its assets originally belonged to the wife and is includible in her gross estate.

The taxpayer testified that he did not understand the technical distinction between community property, partner-

---

[5]A joint tenancy clearly existed as to the funds in these accounts. *Estate of McCoin,* 9 Cal. App. (2d) 480, 50 P. (2d) 114; *Young v. Young,* 126 Cal. App. 306, 14 P. (2d) 580; *Bank of America Nat. Trust & Savings Ass'n v. Rogan,* 33 F. Supp. 183 (S. D., Cal.).

[6]Rights to use a patent may be transferred orally to a business, and become a part of the assets of the business. *Hill v. Miller,* 78 Cal. 149, 20 Pac. 304; *Lyon v. MacQuarrie,* 46 Cal. App. (2d) 119, 115 P. (2d) 594.

ship, and joint tenancy in 1923 or 1928. [R. 265.] On the basis of this it may be argued that there was no intention to change by agreement the ordinary community system, as fixed by law. Yet it is significant that throughout his testimony the taxpayer used the word "survivorship" in connection with his agreement with his wife. And prior to 1923 the joint bank accounts were made payable to husband or wife or "survivor."[7] [See, for example, the account started in 1921, R. 117-120.] The word "survivor" is not beyond the ken of the average or even an uneducated layman, even though the technicalities of the various legal tenancies may be. Survivorship is entirely foreign to the concept of community ownership, yet the spouses here emphasized it. And even if the taxpayer and his wife were not fully aware of the incidents of a joint tenancy or a partnership, they were very definite in their desire to create a status in which each had an equal and existing one-half interest, with the whole going to the survivor. It must be concluded that the legal effect of their agreement was to create a joint tenancy.

The reasons why the District Court ignored the oral agreement are not known. Its minute order states [R. 54] that "the joint tenancy was created in 1928, *confirming the oral agreement of 1923,* * * *." (Italics supplied.) The court's failure to refer to the oral agreement of 1923 in its findings may be attributed to an oversight or to a belief that an oral agreement between spouses is not valid to alter the character of community property. Either reason constitutes reversible error.

---

[7]The Government requested the taxpayer to produce all the bank books but he was unable to produce the books for the years prior to 1921. [R. 113-114.]

It has been seen that the District Court failed to consider material evidence in reaching its conclusion. Approached logically, its decision is likewise not sustainable. It is apparent that if the rotary jar business constituted old-type community property which was transmuted to joint tenancy property solely by the written agreement of January 3, 1928, as the District Court held, the same is true of all other property owned by the spouses. If no effective oral agreement changing the method of owning property existed prior to 1928, the real estate, stocks, and bonds acquired prior to 1923 with joint funds of the spouses and subsequent to 1923 with profits from the rotary jar business were also old-type community property. When transmuted to joint tenancy property in 1928, those properties, like the rotary jar business, would neither have been originally owned by the wife nor acquired by her for any consideration. Hence no part would have been includible in her gross estate. Yet taxpayer did include one-half of all other joint tenancy property in the wife's gross estate and has made no contention that they were erroneously included; nor did the District Court so hold. The inclusion of those properties could only be justified on the theory that an oral agreement existed under which a one-half interest in the properties originally belonged to the wife or that she paid consideration therefor. Yet the same agreement or consideration would also require the inclusion of a one-half interest in the rotary jar business.

But even if the oral agreement is construed as not effective to vest in the wife a one-half interest in the rotary jar business, the taxpayer's claim must be denied for another reason. It is the law of California that where joint bank accounts, payable to either party or the survivor, are established, as in this case, a joint tenancy is created as to those

funds; that the funds are the separate property of each joint tenant, and neither spouse may thereafter claim that the funds were community owned. *Bank of America Nat. Trust & Savings Ass'n v. Rogan,* 33 F. Supp. 183 (S. D. Cal.); *Wallace v. Riley,* 23 Cal. App. (2d) 669, 74 P. (2d) 800; *Estate of McCoin,* 9 Cal. App. (2d) 480, 50 P. (2d) 114; *Young v. Young, supra; Estate of Gurnsey,* 177 Cal. 211, 170 Pac. 402. And the property thereafter purchased with such joint funds retains the character of jointly owned property, even though title to such property is taken in the husband's name. *Estate of Harris,* 169 Cal. 725, 147 Pac. 967.

There can be no question, therefore, that at the very least the joint bank accounts, payable to taxpayer or wife or survivor, were joint tenancy property, in which the wife had a separate one-half interest. They therefore were not community property. *Siberell v. Siberell, supra.* These accounts were established immediately after marriage.

The evidence shows that the entire cost of obtaining the original Kammerdiner patent, the cost of manufacturing the first rotary jar, and the original capital of the business were paid from the joint accounts. [R. 433, 445, 460-462.] Thus the wife became the original owner of the patent, the equipment, and the business, to the extent of one-half. Thereafter all receipts from the business were deposited in the joint accounts, and all property and expenses of the business were paid for with joint funds. [R. 145-147, 206, 264, 434, 450, 459, 467, 470, 472-473.] There can be no question but that the wife's half interest in the profits of the business was her separate property after 1923; or after 1928, if the District Court's holding that she acquired her interest as a joint tenant in that year be adopted for purposes of this argument. The proof

shows that her share of the profits became a part of the joint bank accounts and was reinvested in the business and its assets. Some part of the value of the business and its assets in 1935 was consequently originally owned by the wife, because acquired with her separate property. Yet the taxpayer failed to show what part of the 1935 value was attributable to her separate property and what part to pre-1923 joint funds. The taxpayer had the burden of proof, and in the absence of proof by which such an apportionment could be made, one-half of the entire value in 1935 must be presumed to have been originally owned by her, as the Commissioner determined.

It should be observed that the taxpayer and his wife divided their income from the rotary jar business on their income tax returns from 1925 up to the time of the wife's death in 1935. [R. 63.] This was permissible only if the wife's interest in the property had become her separate property by agreement, as distinguished from the contingent interest given her in old-type community property. Cf. *United States v. Robbins,* 269 U. S. 315; *United States v. Malcolm,* 282 U. S. 792. The spouses thus secured the tax benefits over that period resulting from a division of their income. Having taken the position for over ten years that the wife's interest in the business was separate and vested, it is highly inconsistent and not in the least convincing for the taxpayer to contend now, as he must by assuming his present position, that his income in those years was understated due to erroneous treatment of his wife's interest in the rotary jar business. Such changes

of position on the part of taxpayers for the purpose of securing further tax benefits are not to be permitted. See *Orange Securities Corp. v. Commissioner,* 131 F. (2d) 662 (C. C. A. 5th); *Comar Oil Co. v. Helvering,* 107 F. (2d) 709 (C. C. A. 8th); *Lofquist Realty Co. v. Commissioner,* 102 F. (2d) 945 (C. C. A. 7th); *Robinson v. Commissioner,* 100 F. (2d) 847 (C. C. A. 6th); *Alamo Nat. Bank v. Commissioner,* 95 F. (2d) 622 (C. C. A. 5th); *Commissioner v. Farren,* 82 F. (2d) 141 (C. C. A. 10th), certiorari dismissed 299 U. S. 617.

We submit that the decision of the Board of Tax Appeals in *Kammerdiner v. Commissioner,* 25 B. T. A. 495, is *res judicata*[8] that, by virtue of the oral agreement made in 1923, the rotary jar business was not old-type community property in the years 1925, 1926, and 1927. The Commissioner of Internal Revenue determined deficiencies for the years 1925, 1926 and 1927, on the theory that the

---

[8]The scope of the doctrine of *res judicata* or estoppel by judgment depends upon whether the subsequent action between the same parties is upon the same claim or upon a different claim or demand. Since the instant controversy does not concern income taxes for the years 1925, 1926, and 1927, it is a different claim from that tried before the Board. The inquiry then is whether the point or question to be determined is the same as was litigated and determined by the Board in the earlier suit. *Tait v. Western Md. Ry. Co.,* 289 U. S. 620. See, also, *Sunshine Coal Co. v. Adkins,* 310 U. S. 381; *Bennett v. Commissioner,* 113 F. 2d 837 (C. C. A. 5th); *Greenbaum v. United States,* 17 F. Supp. 83 (C. Cls.); *James v. Commissioner,* 31 B. T. A. 712; *Mallery v. Commissioner,* 42 B. T. A. 793.

There could hardly be any question but that the parties are the same as in the suit before the Board. The party plaintiff in each case is James Kammerdiner. The defendant (respondent) before the Board was the Commissioner of Internal Revenue, while here it is the Collector of Internal Revenue. But it has long been settled that a former judgment as between a taxpayer and the Government or its official agent, the Commissioner, is a bar in a suit against the Collector, who is an inferior official acting under and in privity with them. *Tait v. Western Md. Ry. Co.,* 289 U. S. 620; *Pelham Hall Co. v. Carney,* 27 F. Supp. 388 (Mass.), affirmed on other grounds, 111 F. 2d 944 (C. C. A. 1st).

income of the business was from old-type community property and the entire amount was required to be reported as income by the husband. [R. 61-62.] The husband (the taxpayer in this case) appealed to the Board [R. 219-234, 236-250] and alleged that he and his wife were partners in the rotary jar business in those years, each having a vested interest in one-half of the income therefrom. [R. 220-221, 238.] The entire evidence before the Board was introduced in evidence here. [R. 439-476.] Upon the basis of that evidence the Board made findings of fact as follows (p. 496):

> After the usefulness of such device had been proved by successful tests he [taxpayer] formed a partnership with his wife, Myrtle B. Kammerdiner, for the purpose of manufacturing, renting and/or selling rotary jars to oil well drillers. * * *
>
> * * * * * * * * *
>
> When petitioner [taxpayer] determined to engage in the manufacture and distribution of rotary jars he and his wife entered into an oral agreement to share equally in the profits or losses therefrom.

It also found that the capital for beginning the rotary jar business was drawn from the joint bank account, to which the wife had contributed several thousands of dollars.

The Board concluded that in April of 1923 taxpayer and his wife joined together to carry on a business enterprise for their mutual benefit; that this was sufficient to establish a partnership; and that the taxpayer and his wife

could divide the income from the business. This constituted a holding that the rotary jar business was not old-type community property up to the end of the year 1927[9] Under the principle of *res judicata* the District Court was bound by this decision and was not free to conclude that the rotary jar business was old-type community property prior to the end of 1927. Its holding that the business was converted on January 3, 1928, from old-type community property to property held in joint tenancy is thus erroneous and the decision can not stand. Cf. *Leininger v. Commissioner,* 86 F. (2d) 791 (C. C. A. 6th), holding that a decision defining the extent of a partnership interest owned by the taxpayer is controlling in a subsequent suit involving different years.

In view of the foregoing, it is submitted that one-half of the Kammerdiner rotary jar business and its assets originally belonged to the wife, and that the value of her one-half interest in includible in her gross estate.

---

[9]If the income had been received from community property (acquired prior to 1927), it could not be divided and all would have been taxable to the husband. *United States v. Robbins,* 269 U. S. 315.

II.

The Wife Acquired Her One-half Interest in the Rotary Jar Business and Its Assets for an Adequate and Full Consideration in Money or Money's Worth.

Irrespective of whether a one-half interest in the rotary jar business originally belonged to the wife, Section 302(e) of the 1926 Act requires that the value of her interest as a joint tenant therein be included in her gross estate, if she paid an adequate and full consideration therefor in money or money's worth.

The District Court held that the wife's joint tenancy interest in the business was acquired from taxpayer by gift, without any consideration whatsoever. We submit that full consideration was paid by the wife for her interest.

The evidence in this case shows that the wife made profits exceeding $3,000 in amount from the boarding house venture during the early years of the marriage and that these profits were deposited in the joint bank account owned by both parties. As we have shown, the wife owned a separate one-half interest in all the moneys in the account as a joint tenant. *Estate of McCoin,* 9 Cal. App. (2d) 480, 50 P. (2d) 114; *Young v. Young,* 126 Cal. App. 306, 14 P. (2d) 580; *Estate of Harris,* 169 Cal. 725, 147 Pac. 967.

The cost of obtaining the rotary jar patent and the capital required to start the rotary jar business in 1923 were drawn from the joint accounts. The wife consequently furnished one-half of the funds required to start the business, not only because she owned one-half of the funds, but also because she had actually earned a substan-

tial amount of money which formed a part of the joint funds. This patently constituted a consideration in money for the acquisition of her interest.

But the wife also paid consideration in money's worth in the form of services for her interest in the business. The oral agreement in 1923 between husband and wife provided that they would carry on the business together, sharing profits and losses equally, and with right of survivorship; that the wife would have a vested one-half interest in all the patents, property, and profits of the business as her separate property; and that the husband would take care of the field work and the wife the office work in connection with the business. [R. 100, 199, 201, 206, 252-253, 255, 302-305, 312, 445, 446-447, 468-469.] Thereafter until her death the wife attended to all the office work, devoting her full time thereto, without receiving a salary. The services rendered consisted in part of handling the banking, finances, correspondence, bookkeeping, advertising, billing, and collecting in connection with the business, as well as arranging for the manufacture of rotary jars, and making contracts with customers for rental of the jars. Such services were in no way incidental to the marital status and were a proper subject of contract between husband and wife. Cf. *Brooks v. Brooks,* 48 Cal. App. (2d) 347, 119 P. (2d) 970; *Wren v. Wren,* 100 Cal. 276, 34 Pac. 775; *Moore v. Crandall,* 205 Fed. 689 (C. C. A. 9th); *In re Starr,* 232 Fed. 416 (N. D. Cal.).

In *Berkowitz v. Commissioner,* 108 F. (2d) 319 (C C. A. 3d), the facts were strikingly similar to the case at bar. There a husband and wife started a retail grocery business, to which the wife contributed a small amount of

cash. Throughout the years and up to the husband's death, she gave her full time to the business. She received no salary but testified that she was to share equally in the profits as a partner. The court held that the wife's services constituted a consideration in "money's worth" for a one-half interest in the profits and it remanded the case to the Board of Tax Appeals to find as a fact whether a profit sharing agreement existed, as the wife had testified. The court pointed out that the facts that the wife actually rendered services in connection with the business and that the profits were invested in property which was held jointly were persuasive evidence of the existence of an agreement. See also *Richardson v. Helvering,* 80 F. (2d) 548 (App. D. C.), and *Fletcher v. Commissioner,* 44 B. T. A. 429, which hold that where a wife renders services and contributes money to a business, pursuant to an oral agreement with her husband that she is to have a one-half interest in the business, she has acquired her interest as a joint tenant therein for an adequate and full consideration in money or money's worth.[10]

In the instant case the District Court had before it not only statements of the wife, made before the Board in the earlier case, as to the existence of the agreement and the services performed by her [R. 232-233, 247-248, 466-476] but also direct testimony by the husband agreeing in every respect with her statements. [R. 100, 199, 201, 206, 252-253, 255, 445, 446-447.] There can be no question then

---

[10]Contrast *Fox v. Rothensies,* 115 F. (2d) 42 (C. C. A. 3d), and *Bushman v. United States,* 8 F. Supp. 694 (C. Cls.), certiorari denied, 295 U. S. 756, where no agreement of any kind was made at the time the wife contributed her funds (*Fox* case) and services (*Bushman* case). The later acquisition of property in joint tenancy was held to be without consideration on the part of the wife, because the joint tenancy had no contractual relation to the earlier contributions.

as to the nature of the agreement, and the cited cases are controlling.

It follows that the deceased wife in this case paid full and adequate consideration by way of services and capital contributions for her interest as a joint tenant in the rotary jar business. Accordingly the value of her interest must be included in the gross estate.

Conclusion.

The conclusions of law and judgment of the District Court are erroneous, unsupported by the facts, and contrary to law and the controlling authorities. They should be set aside and vacated by this Court and judgment should be entered for the appellant.

Respectfully submitted,

Samuel O. Clark, Jr.,
Assistant Attorney General.

Sewall Key,
Helen R. Carloss,
Helen Goodner,
Special Assistants to the Attorney General.

Leo V. Silverstein,
United States Attorney.

E. H. Mitchell,
Assistant United States Attorney.

April, 1943.

APPENDIX.

Civil Code of California (1941 Ed):

SEC. 158. *Husband and wife may make contracts.* Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried; subject, in transactions between themselves, to the general rules which control the actions of persons occupying the confidential relations with each other, as defined by the title on trusts.

SEC. 161. *May be joint tenants, etc.* A husband and wife may hold property as joint tenants, tenants in common, or as community property.

SEC. 161a. [*Interests in community property.*] The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband as is provided in sections 172 and 172a of the Civil Code. This section shall be construed as defining the respective interests and rights of husband and wife in the community property.

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 302. [As amended by Sec. 404, Revenue Act of 1934, c. 277, 48 Stat. 680.] The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside the United States—

* * * * * * * *

(e) To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth; *Provided,* That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than an adequate and full consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided further,* That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants;

* * * * * * * *

Treasury Regulations 80, as promulgated under the Revenue Acts of 1926 and 1932 as amended:

ART. 22. *Property held jointly or as tenants by the entirety.*—The foregoing provisions of the statute

extend to joint ownerships wherein the right of survivorship exists, regardless of when such ownerships were created. The statute specifically reaches property held jointly by the decedent and any other person or persons, or by the decedent and spouse as tenants by the entirety, or deposited with any person or institution carrying on a banking business in the name of the decedent and any other person and payable to either or the survivor, provided the decedent contributed toward the acquisition of the property so held or deposited, or acquired it by gift, bequest, devise, or inheritance. This section of the statute applies to all classes of property, whether real or personal, in the case the survivor takes the entire interest therein by right of survivorship, and no interest therein forms a part of the decedent's estate for purposes of administration. It has no reference to property held by the decedent and any other person or persons as tenants in common.

ART. 23. *Taxable portion.*—The entire value of such property is *prima facie* a part of the decedent's gross estate. But it is not the intent of the statute that there should be so included a greater part or proportion thereof than is represented by an outlay of funds which, in the first instance, were decedent's own, or more than a fractional part equal to that of the other joint owner should neither have parted with any consideration in its acquirement. Facts, which in a given case bring it within any one of the exceptions enumerated in the statute, may be submitted by the executor.

Whether the value of the entire property, or only a part, or none of it, enters into the make-up of the gross estate depends upon the following considera-

tions: (1) So much of the property (whether the whole, or a part thereof) as originally belonged to the other joint owner, and which at no time in the past had been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth, forms no part of the decedent's gross estate. (2) If the facts are otherwise the same as in (1), but the decedent paid to such other joint owner a consideration for the interest by him (the decedent) acquired in the property, then such portion of the value of the property, proportionate to the consideration so paid, constitutes a part of the gross estate.

* * * * * * * *

Service of the within and receipt of a copy thereof is hereby admitted this.....day of April, A. D. 1943.

_____

_____

Attorneys for Appellee.